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**BEFORE THE
DEPARTMENT OF TRANSPORTATION
WASHINGTON, D.C.**

DEPT. OF TRANSPORTATION
DOCKETS

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Application of

ORBITZ, L.L.C.

for, to the extent necessary, an exemption
pursuant to 49 U.S.C. § 40109

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) Docket OST-2001- 11086 -1
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APPLICATION FOR, TO THE EXTENT NECESSARY, AN EXEMPTION

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Dated: December 3, 2001

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Orbitz has begun phasing in a nominal fee for its travel agent services in conjunction with the tickets for air transportation that it sells. Airfares and the service fee are unbundled on the Orbitz website – *i.e.*, the fee is not included as a part of the airfare but instead is separately but concurrently stated. Orbitz believes that its practice of fully disclosing both the airfare and the service fee, unbundled, is the best form of disclosure for consumers. Orbitz hereby requests confirmation that such disclosure is also consistent with the requirements of the Department, or, in the alternative, Orbitz requests an exemption from 49 U.S.C. § 41712 (formerly Section 411 of the Federal Aviation Act) and the implementing regulations codified at 14 C.F.R. § 399.80 and 14 C.F.R. § 399.84, to the extent necessary to permit Orbitz to continue unbundling airfares and fees.

Background

In the past six months, Orbitz has energized competition in online travel. Orbitz is now the third-largest online travel agent, and is the only online agent to display flight and fare information in

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a completely unbiased manner, thus providing consumers with access to the broadest array of travel choices in a simple easy-to-use format. Orbitz's entry into the market has encouraged competitors, in some instances, to upgrade their own systems, which previously were little more than Internet storefronts based on antiquated 1960s CRS technology. As explained in Orbitz's November 15, 2001 report to the Department, even consumers who never use Orbitz are therefore better off for Orbitz being in the marketplace.

Responding to the trend in lower airline commissions and consistent with its commitment to provide the consumer the most complete, unbiased flight and fare information possible, Orbitz is in the process of introducing a nominal fee for air transportation tickets booked through Orbitz. This process will simply bring Orbitz in line with much of the rest of the travel agent business, and would help preserve Orbitz' commitment to forego commission override payments made to online and offline travel agents who shift market share to the carrier who pays them the most. As of May 2001, the American Society of Travel Agents reported that 88% of its members assessed service fees for the sale of airline tickets. See [ASTA Releases Results of 2001 Service Fees Report](#), news release (May 18, 2001). Many online agents, including Sabre's Travelocity (for Northwest and KLM tickets), Lowestfare.com, and Cendant/Galileo's Trip.com, also assess service fees for airline ticketing, and agents of all types charge for additional services ranging from the issuing of paper tickets to the processing of refunds.

Although many travel agents now assess service fees for practical business reasons, there are also sound policy reasons that the Department should encourage the development of distribution channels in which the costs are visible to the consumer. Historically, travel agents have derived the greatest part of their revenues from commissions paid by airlines on the sale of tickets. Questions

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have been raised as to whether this business model can distort travel agent behavior, particularly with respect to commission overrides paid by airlines. Agents may have an incentive to direct consumers to certain airlines. This, in turn, may confer advantages on incumbent airlines and can deter new entry. As a result, except for Orbitz, few if any agents contractually guarantee that their search results are unbiased. A recent article in the Consumer Reports Travel Letter (“Is your travel agency playing 'fare'?” June 2001) argues that agents should disclose override commissions or other financial incentives. The Department’s Inspector General has agreed. See Report on Travel Commission Overrides, CE-1999-060 (Mar. 2, 1999).

Orbitz is phasing in a service fee in conjunction with the sale of tickets for air transportation. In response to each search request made by a consumer, Orbitz prominently discloses the fee on its initial search results page, including the exact amount of the fee that will be charged upon ticketing. Additional information about the service fee is available in a pop-up box. That first results page also lists flight and airfare options – often more than a hundred such options. The fares shown are for the cost of air transportation (including taxes if required and airline-associated fees, but not including Orbitz’s service fee). In short, the initial search results page informs the consumer of both the total cost of the airfare and the amount of the service fee.

Moreover, once a consumer has selected a particular airfare, both Orbitz’s personal details page and purchase confirmation page include a full accounting of the amount of the airfare, the amount of the service fee, and the total trip cost.

Furthermore, as part of the phase-in of the service fee, every currently registered Orbitz customer is required to check a box indicating their understanding that Orbitz has added a service fee to its terms and conditions, and every new user is required to agree to terms and conditions,

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including the service fee, before booking their first ticket through Orbitz. (For a limited time, no fee will be assessed for the first booking made by a new or existing Orbitz customer.)

In sum, a consumer using Orbitz will be well informed before making a booking of the existence of the service fee, the airfare, and the total amount of their purchase, as is required by § 41712.

Discussion

The guiding principle behind § 41712 and the Department's implementing regulations is that clear and accurate fare, service, and price information must be provided to consumers. Orbitz agrees 100% with this principle. Orbitz has studied consumer preferences in depth and believes that its method of full disclosure both of airfare options and of the service fee is the form of disclosure that works best for consumers. Orbitz also has reviewed fully the Department's public record of regulatory actions, orders, and industry letters, and believes that its method of disclosure fully meets the Department's requirements and that no exemption is necessary. However, because there is very little existing guidance from the Department on the subject of travel agent service fees,¹ Orbitz submits this application as a precaution. In addition, the Department's action on the application will provide an opportunity for the Department to provide general guidance to online and traditional agents on the subject of service fees.

¹ Service fees are a distinct issue from the component costs of air transportation itself, such as fuel surcharges. The Department repeatedly has made it clear that such costs must be included in the airfare quoted (see, e.g., Internet Fare Advertising Industry Letter (January 18, 2001)), and no change in that policy is appropriate or sought. A travel agent service fee is a separate price charged for a separate service in a separate market. The consumer does not have the option of buying the ticket without the fuel surcharge, but does have the option of buying the airfare without the agency service fee (or with a different agency service fee) by making the purchase through a different channel. Consumers need the information that would enable them to make informed choices both in the airfare market and in the agency service fee market. Sound public policy requires effective competition both in the airfare market and in the agency service fee market.

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The Department never has held on the public record that airfares and service fees must be bundled together. To date, the Department simply has observed that one online agent's presentation of information about its service fee did comply with § 41712. See Lowestfare.com Consent Order, DOT Order 2001-9-3 (Sept. 6, 2001).² The Department has not had an opportunity to indicate what other service fee disclosure practices likewise comply with § 41712, and what practices may be incompatible with § 41712.³

Orbitz believes that its presentation of information about service fees is superior to the presentations currently in use by some online agencies, which bundle the agency fee with the airfare so that the consumer is not informed, at least initially, as to how much of the total trip cost is airfare and how much of the total trip cost is the service fee. Because Orbitz's service fee will be listed separately but prominently in Orbitz's initial display, a consumer will be able to initially see and compare all of the airfares in a requested market, as they may be available through any channels which do not charge a service fee or which charge a different service fee.⁴ Historically, the

² "On its Internet site, Lowestfare.com states, in a prominent manner close to all listed Northwest fares, that an additional service fee applies and must be added to the stated fare and it lists the amount of the service fee and the total price to be paid. We find that this disclosure is adequate and meets the requirements of Section 399.84 since the alert regarding the service fee and its amount appears prominently on the first screen that states a price, and a total price, including the service fee, is displayed as prominently as the price less that fee."

³ In 1970, the Civil Aeronautics Board appears to have taken the position that fees an agency charges for its general expertise should not be included in airfare price quote. In Order 70-5-35, at 10-11 (May 8, 1970), the Board stated:

[W]here the travel agent acts as an advisor or consultant for his client, performing services neither covered in, nor contemplated by, tariff requirements, nor part of the carrier's obligation, he acts as a private entrepreneur. Unless prohibited from doing so by his agency agreement, as approved or conditioned by the Board, and in the absence of any unfair or deceptive practice, the Board believes the agent may make reasonable charges for his service insofar as the limitations of the Federal Aviation Act are involved. Of course, those service charges must be assessed under circumstances which would preclude any implication that the charges were tied to, or in connection with, air transportation offered by the carrier.

(Emphasis added.)

⁴ It is also true that this approach reduces clutter at a point in the process when Orbitz displays many flight and fare options. Many online agents typically display nine or fewer search results, and do not employ a format which easily allows for the comparison of the price and features of itineraries. Orbitz, in contrast, formats its search results quite

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Department has allowed charges assessed and collected by a third party to be listed separately from an airline's airfare information, so long as consumers are clearly and accurately informed of the total cost of a purchase. For example, in its industry letter dated July 14, 1995 concerning air tour advertising, the Department explained that additional charges collected by a hotel and not a tour operator – such as an energy surcharge, linen charge, or security fee – can be listed separately. Moreover, § 399.80(f) specifically prohibits travel agents from misrepresenting fares and charges for air transportation. Incorporating an undisclosed service fee into an airfare quotation clearly misrepresents what the airfare is. See also Order 70-5-35.

Based on both precedent and the principle of full disclosure, online agents should affirmatively disclose any fees for their services distinct from airfares, and to show them both separately and combined prior to any booking commitment by a consumer. This presentation format would best enable the consumer to make his or her own calculation as to which of the itineraries displayed is the best priced, apart from the value added to the transaction by the booking agent. Moreover, transparency of fees also can be expected to encourage service fee price competition in the secondary market for agent services.

Consumer Reports has advocated, as a general principle, that travel agents should disclose both service fees and airfares and should do so separately, out of a belief that this is the best and fullest form of disclosure. In fact, Consumer Reports goes as far as to take the position that the practice of bundling a travel agent's service fee in an airfare quote is a deceptive practice:

Paying for the services of a competent and unbiased travel agent can be a bargain. But it shouldn't be a mystery. Many of the travel agencies we surveyed failed to tell us that the

differently. Orbitz allows consumers to choose among all of the itineraries produced by a search – often more than a hundred – and incorporates a grid into its displays which facilitates head-to-head comparison among all airlines.

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quoted fares also included the agency's service fee (overall, these fees ranged from \$5 to \$30 for airline bookings). In fact, we often had to pull teeth to determine the existence and amount of the fee. In our view, this practice is deceptive.

Consumer Reports Travel Letter ("Is your travel agency playing 'fare'?" June 2001).

As the Department has recognized, the capabilities of the Internet allows travel agents to offer consumers interactive features that were not possible in traditional print media advertising – i.e., a consumer can ask for more information about a particular subject and be directed to a web page expanding on that subject. See, e.g., Internet Advertising Industry Letter, at 3-4 (Mar. 18, 1996). The Internet and the online sale of transportation continue to evolve, and service fees are a part of that evolution. Orbitz believes that its method of service fee disclosure is the best adaptation of the Department's principle of full disclosure under § 41712 to the properties and capabilities of the Internet. Orbitz therefore believes that this method of disclosure is fully compliant with the Department's publicly stated requirements. If, however, the Department believes that an exemption is necessary or advisable for any reason, Orbitz now requests that exemption.

It is also noteworthy that service fees are almost ubiquitous among traditional agents. According to a survey of 200 traditional travel agents conducted by Frank N. Magid Associates, Inc., 72% now assess a fee for airline ticketing. However, of the agencies that assess service fees, 47% neither included the fee in the ticket price nor separately disclosed the amount of the fee upfront. An additional 42% bundled the fee in the stated airfare quote, without disclosing to the consumer that a portion of it was the agent's service fee, unless asked. The Department may wish to take the opportunity of this application, or some other device, to offer general guidance

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on the wide range of agency fee disclosure practices that exist today, either among online agents only or with respect to both online and traditional agents.

WHEREFORE, Orbitz respectfully asks the Department to clarify that the format in which Orbitz discloses its customer service fee for tickets booked through Orbitz complies with the existing requirements of § 41712 and the Department's implementing regulations, because it fully informs consumers of the agency fee, of airfares, and, before the booking is made, of the combined total cost of a transaction. In the alternative, Orbitz asks that the Department issue an exemption authorizing Orbitz to employ that same disclosure format, because it would be consistent with the purposes of § 41712 and of the Department's implementing regulations, and with the public interest. Finally, Orbitz asks the Department to consider providing guidance for the industry as to what other agency service fee disclosure formats would and would not comply with the requirements of § 41712 and the Department's implementing regulations.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Frank J. Costello", is written over a horizontal line.

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